their removal and settlement in the State of Ohio, and the care which he has taken to secure to them the provisions for their comfort and welfare, according to the will. It is pleasant to contemplate, in the present generation, that there even yet remain men who have retained the magnanimity undiminished which was left by our ancestors as an example for their posterity.

This distinguished and noble conduct of Judge Leigh is deserving, in our view, of the highest commendation, and justly entitles him to universal confidence and respect. Men of his high, humane, and rigidly virtuous character are the brightest ornaments and most precious treasures of the community in which they reside; their examples are the most powerful of all influences for good; they shine out enduringly like the lights of heaven over the selfishness and degeneracy of the times, alone, immortal, amid our changes, decay, and death.

FRAUD BY MISREPRESENTATION OF A MATERIAL FACT.

"A false representation of a material fact, constituting an inducement to the contract, on which the purchaser has the right to rely, is a ground for a rescission by a court of equity, although the party making the representation was ignorant as to whether it was true or false." These are the words of Judge Staples in the leading case of *Grimm v. Byrd*, 32 Gratt. 300, and have often been quoted in the Virginia decisions in subsequent cases when equitable questions involving fraudulent representations have been under consideration.

The law is undisputed, but what is a representation of a fact, as contradistinguished from an expression of opinion, has been a source of trouble to many members of the bar. This is shown not so much by the number of cases that have gone to the Court of Appeals on the point, as by the numerous cases that have been determined in the Circuit Courts, and, for various reasons, have not been appealed.

The confusion in mind has been added to, I think, by a misapprehension of another expression used in the opinion rendered in the case just referred to, where the learned judge says: "Now, it may be conceded that in all this class of cases the representations must, as a general rule, be of a fact, as distinguished from a mere matter of opinion, which ordinarily is not presumed to deceive or mislead. But even a matter of opinion may amount to an affirmation, and be the inducement to a contract, especially where the parties are not dealing on equal terms and one of them has or is presumed to have means of information not equally open to the other."

In the case under consideration Byrd had traded to Grimm a lot of stock in a hopelessly insolvent company for a tract of land, having induced the contract by a number of false and fraudulent representations upon which Grimm was induced to rely by reason of Byrd's intimate association with the company, as a stockholder. These were not expressions of opinion, but positive affirmations of facts.

But the sentence just quoted need not give any trouble in the elucidation of the law if interpreted by the authorities referred to, to sustain it.

In Pomeroy on Contracts, page 212, the writer says: "The true rule is, that the representation cannot itself be the mere expression of an opinion held by the party making it, but must be an affirmation of a fact, but the very fact concerning which the statement is made may be an opinion. In all such cases, however, there must be the positive affirmation that the opinion is held by the specified (third) person that it exists as a fact, which is something quite different from the expression of an opinion." And Judge Story, in his exposition of the law of contracts, Vol. 1, sec. 511, says: "Ordinarily, a naked statement of opinion is not a representation a buyer is legally entitled to rely upon, unless perhaps in some special case, where the peculiar confidence or trust is created between the parties. . . . Mere expressions of opinion are not therefore considered so tangible a fraud as to form a ground of avoidance of a contract even though they be falsely stated." And by way of illustration he uses the example of an expert, who knows that his judgment is relied on, and makes a false statement of opinion for the purpose of misleading the other party. But these cases, says he, are peculiar in their circumstances and form an exception to the general rule. Aside from the expressions of opinion referred to, and which are shown to be exceptions to the rules within a narrow scope, what character of representations is essential to rescind a contract? Plainly representations of facts *coeval with or prior to the date of the contract.* This expression would appear superfluous, as a mere multiplication of words—since the word "fact" means "a thing done," a deed—but for the loose method of using language. We tell of a future occurrence and are confronted by the question if what we relate is a fact, or we emphasize our own narration of a future occurrence or purpose by stating that it is a fact.

Those who will take the pains to examine will frequently find such expressions as these in bills of complaint filed to set aside contracts on the ground of fraud, "that the defendant stated it, as a fact," or

"stated the fact," or "gave it as a matter of fact," &c., that a hotel would be built, that a railroad would be constructed, that the town would number 10,000 people within a certain period of time, or expressions similar to these.

But sometimes a word or a term by long usage changes its meaning, as, for illustration, the word "prevent," which originally meant to go before, but now conveys the idea of hindrance or obstruction. Has the word "fact" in its legal acceptation, in the expression under consideration, undergone such a change? An examination of the cases decided by the Court of Appeals will aid us in our conclusion. The facts in the case of *Grimm v. Byrd* have already been alluded to. In *Crump v. U. S. Mining Co.*, 7 Gratt. 352, the defendants represented, by written proposals and by agent, the description and value of the gold mine and condition of the company, by which plaintiffs were induced to purchase stock.

In *Lowe v. Trundle & als.*, 78 Va. 65, the plaintiff purchased some judgments from the defendant at a grossly inadequate price upon the false representation that they were worthless.

In *Linhart v. Foreman's Adm'r & als.*, 77 Va 540, Foreman and his associates induced Linhart to purchase a tract of land by representing to him that there were no incumbrances on it, which was contrary to the truth.

In *McMullin's Adm'r v. Sanders*, 79 Va. 357, McMullin, who had bought a tract of land at a judicial sale, induced Sanders to take it off his hands, by representing to him that it was sold for judgments obtained against the debtor before his marriage, and hence was not subject to dower, which, upon the death of the debtor shortly afterward, proved to be untrue.

In *Wilson v. Carpenter*, 91 Va. 183, Wilson and his associates, through an agent, made positive assurances to Carpenter that the Rockbridge Company, promoters of the town in which they desired to sell him a lot, had already secured a certain sum of money from an English syndicate, which they were going to expend in building up the town, and induced him to buy. The statement proved to be untrue.

Other cases which may be referred to, to prove that the representations are of facts, past or present, are *Brown v. Rice's Adm'r*, 26 Gratt. 473; *Hull v. Fields & Thomas*, 76 Va. 607.

The *Max Meadows L. & I. Co. v. Brady* (1 Va. Law Reg. 427; 22 S. E. Rep. 845), is an interesting and instructive case on the point in question.

In this case, Judge Keith, speaking for the whole court, says: "The representations relied upon may be divided into two classes—representations of matters of fact, and representations of matters of opinion. In so far as the defendant company made statement of facts, it appears by the evidence that those statements were true, and, in so far as the statements were matters of opinion, it appears that those opinions were honestly entertained, and would in no event constitute sufficient ground for a rescission of the contract." And again: "The distinction between representations of fact and of opinion have been so clearly set out in the recent opinions of this court, that I feel it unnecessary to do more than refer to them. They show that the misrepresentation which will sustain an action of deceit, or a plea at law, or a bill for rescission of a contract, must be positive statements of fact, made for the purpose of procuring the contract, that they must be untrue, that they are material and that the party to whom they were made relied upon them, and was induced by them to enter into the contract."

In the case of *Watkins v. West Wytheville L. & I. Co.*, 22 S. E. Rep. 556, Judge Harrison, also speaking for the whole court, says: "A misrepresentation, the falsity of which will afford a ground of action for damages, must be as to an *existing* fact. It must be an affirmative statement, or affirmation of some fact, in contradiction to a mere expression of opinion, which ordinarily is not presumed to deceive or mislead. This is the general rule in all of this class of cases." . . . . When, for the purpose of obtaining a subscription, a promise was made that a branch road would be built, it was held that this promise was but the expression of an existing intention, which was liable to be changed, and was no defence, quoting Cook on Stockholders, 3138.

Before closing this article, however, I would not be dealing with fairness to myself or candor to the readers of the REGISTER did I not notice the case of the *Rorer Iron Co. v. Trout*, 83 Va. 397.

The facts in that case, as stated in the opinion, are these: "The lessees represent to the lessors that they are about entering upon extensive operations in mining and marketing ores; that they have the means at hand for successfully working a force capable of mining and transporting such a quantity of ore daily that the royalty thereon would, at ten cents per ton, yield the owners of the property not less than ten dollars per day, collectible every night, if desired, and promising to commence operations in sixty days. Upon these representa-

tions they secure a lease for twenty years, but utterly fail to comply with their promises."

In commenting upon these facts, the learned Judge says: "The false representations thus made by the lessees, and by means of which an unconscionable advantage was taken of the lessors, were of matters peculiarly within the knowledge of the lessees, and on which the lessors relied and acted, as they had a right to do, and they were deceived and injured by them, because they were false. These false representations were not held out as opinions merely, but were positive affirmations, especially adapted to the end in view, which was to obtain the lease of the mining privileges aforesaid. By these means they obtained the deed of lease, but the lessors got nothing. And it is on this ground that the suit was brought to annul the deed. It is of every-day occurrence that courts of equity cancel contracts on this ground."

In reviewing this case in the light of the other decisions, I hope I do not appear presumptious in suggesting the following questions: Were these representations of existing facts, or were they such expressions of opinion as would come under an exception to the rule? If not, is the doctrine laid down in the case of *Rorer Iron Co. v. Trout* tenable? I would like to see the views of other members of the profession on this point.

M. M. CALDWELL.

Wytheville, Va.